Criminal Appeal No. 379 (DB) of 1988
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Against the judgment and order dated 7.7.1988 passed by Sri Basudeo Sahai, 3rd Additional Sessions Judge, Saharsa, in Sessions Trial No.100 of 1984.
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1. Muso Jha &
2. Ragho Jha … … Appellants

Versus

The State of Bihar … …Respondent
***

For the appellants : Mrs. Rina Sinha, Amicus Curiae

For the respondent : Mr. Lala Kailash Bihari Prasad, A.P.P.
***

P R E S E N T

Hon'ble Mr. Justice Sudhir Kumar Katriar
&
Hon'ble Mr. Justice Syed Md. Mahfooz Alam
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S.K.Katriar &
S.M.M.Alam, JJ. This criminal appeal has been preferred by the two appellants against the judgment and order dated 7.7.1988, passed by the 3rd Additional Sessions Judge, Saharsa, in Sessions Trial No.100 of 1984, whereby he has been pleased to convict both the appellants under section 302/34 of the Indian Penal Code and sentenced them to undergo R.I. for life.

2. The prosecution case, in brief, is that on 2.1.1984 the informant Mohan Pathak (P.W.12) went to Mahisi P.S. and gave his statement before the Officer in charge of the said P.S. stating therein that on the same day at about 1 PM he and his father were going to collect bundles of straw from the field situated towards east of the village. The informant's father was going ahead of the informant and

the informant Mohan Pathak was behind him at some distance. The informant saw the appellants picking up straw from his field over which his father raised alarm and went there running in order to stop the appellants from taking away the straw. As soon as the informant's father reached near the appellants and tried to stop them from picking up straw the appellant Muso Jha threw him down and then both the appellants started assaulting him with fists and legs. They also gave blows on his chest and other parts of his body. The informant as well as his father raised hulla of "Bachao Bachao". It is further said that appellant Muso Jha gave several blows of fists and legs on the chest of his father and also tried to press his neck and twisted it (neck). Due to assault, the informant's father became senseless and then the appellants fled away. Thereafter, the informant ran to the place of occurrence and found his father dead. It is said that on hulla witness Modh Narain Pathak (P.W.1), Indra Kant Mishra (P.W.2), Garhai Mahton (not examined), Sureshwar Jha (P.W.3) came there and witnessed the occurrence. The motive behind the occurrence was that the informant's father used to guard the straw as a result of which, the accused persons were not getting chance of stealing the same and, so, they were aggrieved with the informant's father.

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3. On the basis of the above statement of the informant, Mohan Pathak (P.W.12), Mahishi P.S. case no.1 of 1984 under section 302 of the Indian Penal Code was instituted against the appellants and the investigation of the case was taken up by PW 13 Shyam Kumar Singh, who was the then Officer in charge of the said police station.

During investigation, the said Officer in charge visited the place of occurrence, recorded statement of the witnesses, prepared inquest report and sent body for post-mortem examination. It appears that during investigation of the case he was transferred and as such, he handed over the charge of the investigation of the case to SI Sri R. K. Ram (not examined), who submitted charge-sheet in the case as the investigation was already complete.

4. After submission of the charge-sheet, cognizance was taken and the case was committed to the Court of Sessions for trial. Thereafter on 12.11.86, charge under section 302/34 of the Indian Penal Code was framed against both the appellants. The appellants pleaded not guilty and so, they were put on trial.

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5. To prove the charges levelled against the appellants, the prosecution has examined altogether thirteen witnesses, namely, Modh Narain Pathak (PW1), Indra Kant Mishra (PW2), Sureshwar Jha (PW3), Prem Chand Jha (PW4), Dr. J. Lal (PW5), Bhagirath Jha(PW6), Jai Shanker Prasad (PW7), Bhikhari Mahto (PW 8), Moti Paswan (PW 9), Bechan Pathak(PW 10), Mohar Pathak (PW 11), Mohan Pathak (PW 12) and Shyam Narain Singh (PW 13). Out of the above said witnesses, PW12 is the informant of this case, PW13 is the I. O. of this case, PW 5 is the doctor, who had conducted post-mortem examination on the dead body of the deceased, P.W. 7 is the witness of inquest report, P.W.9 is the witness of seizure, PW 2, 8, 10 and 11 are tendered witnesses, P.W.6 Bhagirath Jha is the owner of the land over which the occurrence had taken place. The rest witnesses are said

to be the eye witnesses of the occurrence. Besides the oral evidence some papers have also been brought on record by the prosecution which has been marked exhibits. Ext.1 is the post mortem report in the hand-writing of Dr. J. Lal (P.W.5). Ext. 2 is the inquest report, Ext.3 is the seizure list, Ext. 4 is the FIR, and Ext.5 is the challan of the dead body sent for post-mortem examination.

6. The defence has also examined two witnesses, namely, Sudin Choudhary (DW 1) and Maharaja Jha (DW 2). They are on the point that village Mahishi consists of two Tolas i.e. eastern and western Tola and there is group rivalry between the residents of eastern Tola and western Tola. The appellants are the residents of western Tola, whereas, the informant and the witnesses are the residents of eastern Tola and due to group rivalry the appellants were falsely implicated in this case. DW 2 has deposed that Modh Narain Pathak, Sureshwar Jha, Bhagirath Jha and Kusum Pathak @ Gangadhar have no lands in Banbad Bahiyar of Mauza Mahishi. DW 2 has also deposed that Khurkhur Pathak (deceased) was never the Bataidaar of Bhagirath Jha over the lands situated in Banbad Bahiyar of Mauza Mahishi.

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7. In order to come to the conclusion as to whether the prosecution has succeeded in proving its case, first of all I would like to discuss the evidence of PW 12, who is the informant of this case. This PW 12 is the son of deceased Gangadhar Pathak alias Khurkhur Pathak. According to the prosecution case, at the time of alleged occurrence, the informant was going to Banbadh Bahiyar along with

his deceased father for carrying paddy crops. His father was going ahead of him and he was behind him at few steps. While they were about to reach Banbadh Bahiyaar, they saw appellant Muso Jha and Ragho Jha committing theft of bundles of paddy straw. On seeing them, the informant's father (deceased) ran towards the field and as soon as he reached near the appellants, one of them namely, Muso Jha threw him down on the ground and thereafter both the appellants started assaulting him with fists and legs and due to the said assault the informant's father died. Let us see whether PW 12, who is the informant of this case, has supported his case as made out in the FIR before the trial court. The evidence of PW 12 is as follows: About quarter to four years back on a Monday at about 1 PM the occurrence took place. On that day he along with his father were going to Banbadh Bahiyaar for bringing paddy straw from his field. When they reached near the field they saw both the appellants committing theft of paddy straw whereupon, his father raised hulla and simultaneously rushed towards the appellants. He also followed his father. He has further said that his father tried to obstruct the appellants from taking away the paddy straw, whereupon, appellant Ragho Jha started assaulting his father with fists and legs and in the meantime, Muso Jha threw him down and thereafter both the appellants started assaulting him with fists and legs. They also twisted his neck. The informant raised hulla of "Bachao Bachao" but by the time he (PW12) arrived there his father was dead. He has further deposed that after assaulting his father the appellant fled away towards south east. The occurrence

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was witnessed by Modh Narain Pathak (PW1), Sureshwar Jha (PW 3), Prem Chand Jha (PW4), Garhai Mahto (not examined), Indra Kant Mishra (PW 2) besides him. He has further deposed that the motive for the occurrence was that the informant's father used to keep watch over the standing crop due to which the appellants had no opportunity to commit theft of the crop.

8. From the above examination-in-chief of PW 12, it appears that PW 12, who is the informant of this case, has fully corroborated the version of the F.I.R. His examination-in-chief as well as cross-examination at para 24 shows that the land from which the appellants were trying to take away paddy straw belonged to one Bhagirath Jha, who had given the said land to the informant on Batai. The said Bhagirath Jha has been examined as PW 6 in this case and he has deposed that the land appertaining to Plot no. 10796/ 13883 of Khata no.440 of Mauza Mahishi belongs to him and he had given it to the deceased on Batai. Thus, the possession of the deceased/ informant over the land from which the appellants were committing theft of paddy straw stands fully established from the evidence of PW 6. This fact has also been corroborated by other witnesses, who have come to depose on behalf of the prosecution.

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9. We have already stated above that PW 1, 3 and 4 are the witnesses on the point of occurrence and it appears that all the above said witnesses have fully corroborated the evidence of P.W.12 in their evidence. Their evidences are being incorporated in the following paragraphs.

10. The evidence of PW 1 Modh Narayan Pathak is as follows: The occurrence took place about three years four months ago. It was Monday. The time was 1.30 PM At that time; he was at Banbadh Bahiyaar of Mauza Mahishi. He was grazing his cattle at a distance of 70-75 yards from the place of occurrence. He heard hulla. Ragho Jha, Muso Jha and Gangadhar Pathak @ Kurkur Pathak were raising hue and cry. Ragho Jha and Muso Jha were on one side and Gangadhar Pathak @ Khurkhur Pathak was on another side. In the meantime, Ragho Jha started assaulting Gangadhar Pathak from behind, whereupon, Gangadhar Pathak raised hulla of "Bachao Bachao" and then he (PW 1) went there. He has further deposed that in the meantime Muso Jha threw Gangadhar Pathak alias Kurkur Pathak down on the ground and started assaulting him with legs, fists and knee. Ragho Jha also assaulted Gangadhar Pathak. PW 1 has further deposed that when he reached near Gangadhar Pathak, he found him dead. Thus, the evidence of PW 1 also shows that he has fully corroborated the evidence of PW 12 made before the court. This witness in the cross-examination has specifically stated that the assault had taken place in the field of Bhagirath Jha which establishes that the P.O. is the field of Bhagirath Jha. There is nothing in his cross-examination which can make the prosecution case doubtful except this fact that he has not stated that at the time of occurrence the informant was also present near the place of occurrence.

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11. Another witness on the point of assault is PW 3 Sureshwar Jha. His evidence is that the occurrence took place about

three and half years ago. It was Monday. The time was between 12-1 PM. At that time, he was grazing his cattle at a distance of 200 yards from the place of occurrence. He heard hue and cry of Kurkur Pathak @ Gangadhar Pathak and Mohan Pathak (informant) and then he rushed towards the place of occurrence. He saw deceased Gangadhar Pathak was snatching paddy straw from the appellant Muso Jha. In the meantime, appellant Ragho Jha started assaulting the deceased with fists and slaps but even then Gangadhar Pathak did not loose his grip over the straw and then appellant Muso Jha threw him down and started assaulting him (Gangadhar Pathak) with legs, knee and fists. Appellant Ragho Jha also assaulted Gangadhar Pathak while he was lying on the ground. He has further deposed that due to assault Gangadhar Jha died. Thus, the evidence of P.W.3 also shows that he has fully corroborated the evidence of the informant made before the Court. There is nothing in his cross-examination which can show that this witness has falsely deposed against the appellants.

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12. PW 4 Prem Chand Jha is another witness of the occurrence. He has given the same version of the occurrence as given by PW 1 and 3. He has also supported this fact that when Gangadhar Pathak tried to stop the appellants from taking away the bundles of straw, he was firstly assaulted by appellant Ragho Jha with fists and slaps and then appellant Muso Jha threw him down and then he assaulted Gangadhar Pathak with fists and slaps. He has deposed that he has tried to intervene but Muso Jha assaulted him with leg and due to that he became afraid. He has also deposed that the occurrence had

taken place in the Batai field of Gangadhar Pathak which belonged to Bhageshwar Jha (Bhagirth Jha). Thus, it appears that P.W.4 has also fully supported the manner of occurrence.

13. From the evidence of the above said witnesses, it is established beyond doubt that on the alleged date of occurrence the deceased Gangadhar Pathak had sustained injuries on his person at the hands of the appellants and immediately after sustaining the said injuries the deceased died at the place of occurrence itself. According to the evidence of the prosecution witnesses, the appellant had brutally assaulted the deceased with fists, slaps and legs, as a result of which, the deceased had sustained fatal injuries.

14. Let us see whether the ocular evidence finds corroboration from the evidence of the doctor as well as the post-mortem report. PW 5 is Dr. J. Lal. His evidence is that on 3.1.1984 at 2 PM he had conducted post-mortem examination on the dead body of Gangadhar Pathak @ Kurkur Pathak and had found the following ante-mortem injuries on his person:

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I. Abrasion 2-1/2" x ½" on the outer side of the left leg.
II. Abrasion 1" x ½" on the right thigh.
III. Bruise 2" x 1" on the 5th space in the right side of the chest wall.
IV. Bruises 2" x 1", 2" x 1" in the 5th, 6th, 7th inter coastal spaces on the left side of the chest. The left 5th, 6th and 7th ribs were fractured. The left lung was torn 1" x 1" with blood in the left side of the chest cavity. 400 milliliter of blood was found.

P.W.5 has opined that injury no. IV was fatal. He has further opined that all the injuries were caused by hard and blunt

substance such as fists, legs, knees. He has proved his post-mortem report which has been marked Ext.1. From the evidence of P.W.5 Dr. J. Lal, it is established beyond doubt that the deceased had sustained as many as four injuries on his person which were caused by hard and blunt substance and as per his opinion the hard blunt substance might be the fists, leg and knee. Thus, the evidence of the doctor fully corroborates the prosecution case that on the alleged date and time of occurrence the deceased Gangadhar Pathak was brutally assaulted by the two appellants with fists, slaps and legs as a result of which, the deceased had sustained as many as four injuries on his person. The evidence of PW 5 further shows that injury No. IV was grievous in nature and the same was the cause of death. This injury shows that the doctor had found that due to assault the 5th, 6th and 7th ribs of the deceased were fractured and, so, there cannot be two opinions that due to assault done by the appellants the deceased had sustained fatal injury. Thus, I find that the prosecution case finds corroboration from the evidence of the doctor also.

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15. As regards PW 2, 8, 10 and 11 are concerned, they are tendered witnesses and they have not deposed on the point of occurrence as such, their evidence needs no discussion. So far PW 7 is concerned, he is a witness of the inquest report and he has not stated anything with regard to the actual occurrence and, as such, his evidence also does not require any discussion. PW9 Moti Paswan has simply proved the seizure list which has been marked Ext.3 and there is nothing in his evidence to be discussed here.

16. PW 13 is the Investigating Officer. His evidence is that he had recorded the statement of Mohan Pathak and on that basis he had instituted Mahishi P.S. case no. 1 of 1984 under section 302 of the Indian Penal Code. He has deposed that after institution of the case he took up investigation and during investigation he prepared inquest report (Ext.2), sent the dead body for post-mortem examination along with the forwarding letter (Ext.5), also prepared seizure list (Ext.3) of bundles of straw seized from the place of occurrence, recorded further statement of the informant and the statement of the witnesses and inspected the place of occurrence. According to his statement, he had found some trampling marks near the place of occurrence. According to his evidence, place of occurrence lies in Mauza Mahishi appertaining to plot no.10796/13833 of Khata no.440 which belongs to Bhagirath Jha (P.W.6) and the deceased was Bataidar over the same. Thus, the evidence of PW13 also supports that the P.O. is the Batai land of the deceased appertaining to plot no.10796/13833 of Khata no.440 of Mauza Mahishi and near the place of occurrence P.W.13 had found the mark of trampling. Thus, the P.O. is also well established.

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17. Thus, from the scrutiny of the above said witnesses it is established beyond doubt that on the alleged date of occurrence both the appellants had assaulted the deceased, as a result of which, the deceased Gangadhar Pathak had sustained simple as well as grievous injuries on his person and due to the said injuries he died at the spot.

Thus, the prosecution case stands fully proved from the evidence of the above said witnesses.

18. As regards the defence witnesses, it appears that they have deposed that due to village rivalry appellants have been falsely implicated but no specific reason for false implication has been given and, therefore, their evidence does not inspire confidence.

19. It has been argued by the learned Amicus Curiae that this case falls under section 304 Part II of the Indian Penal Code and not under section 302 of the Indian Penal Code. She submitted that section 300 of the Indian Penal Code defines murder. Exception I of the said section defines "When culpable homicide is not murder". She has referred Exception IV which reads thus:

> "Exception IV – Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."

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According to her argument, the occurrence had taken place without premeditation and during sudden fight which took place due to snatching of straw by the deceased from the hands of the appellants. She submitted that this circumstance shows that the occurrence had taken place due to sudden fight and in the heat of passion and so, it attracts Exception IV of Section 300 of the Indian Penal Code. She submitted that by applying Exception IV it can at best be held that the appellants are guilty of the offence punishable under section 304 Part II of the Indian Penal Code. In this regard, learned Amicus Curiae has placed reliance upon the decisions

reported in 2005 Cr. L J 2555 (Dattu Shamrao Valake and another Vs. State of Maharashtra) and AIR 1996 SC 2741 (Ranjha and another Vs. State of Punjab). In the case of Dattu Shamrao Valake and another Vs. State of Maharashtra (2005 Cr LJ 2555) the Apex Courrt at para 20 while discussing the circumstances in which murder was committed held like this:

> "The case of the accused No.1st appellant undoubtedly falls under section 304, Part II. As noticed supra, A-1, although having fire arm, did not shoot the deceased or any other member of the prosecution party. Other than the gun, he was not having any weapon in his hand. Instantaneously he picked up the axe that was in the hands of the injured Bajirao and dealt a blow with that axe on the neck of the deceased Krishna. Though another injury was found on the left parietal region, according to the Doctor-PW5, it was injury No.1 that was serious. Krishna who, according to the post-mortem report, was aged about 75 years, succumbed to the injury the following day. It is reasonable to infer, from the conduct of the Ist appellant and the manner of attack on an old person, that the appellant no.1, by causing the injury with axe on the neck of the deceased-Krishna, was having knowledge that the said act was likely to cause death; but he, had no intention to cause death or such bodily injury as was likely to cause death. We, therefore, find the Ist appellant-A1 guilty under section 304, Part II."

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In the case of Ranjha and another Vs. State of Punjab (AIR 1996 SC 2741), the Apex Court while dealing the circumstances in which the murder was committed has held at para 10 like this:

> "The next question, which is required to be considered, is whether by causing the death of Khanu the appellants committed the offence of murder, as held by the High Court, or culpable homicide not amounting

> to murder. From the injuries found on the person of Khanu, as detailed earlier, we get that except one abraded contusion on the back of the lower part of the chest (injury no.3), beneath which three ribs were found fractured, all other injuries were simple and most of them were inflicted on non-vital parts of the body. If really the three accused persons intended to cause death of the deceased it was likely that they would have caused much more grievous injuries on vital parts of the body more so when they were armed with deadly weapons. Considering this aspect of the matter and the nature of the injuries sustained by Khanu, we feel that the offence committed by the two appellants in causing the death of Khanu comes under S 304 (Part II) I.P.C. We, therefore, set aside the conviction and sentence of the appellants under S.302/34, IPC; and instead thereof convict them under S.304 (Part II)/34 IPC and sentence each of them to suffer rigorous imprisonment for seven years."

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On the strength of the above said decisions, the learned Amicus Curiae argued that admittedly as per the medical evidence the appellants had inflicted four injuries to the deceased and only one injury was found grievous in nature. She submitted that in the case of Ranjha and another (supra) the Apex Court on the basis of only one fatal injury held that the case falls under section 304 Part II of the Indian Penal Code and since this case is of similar nature and so this case also falls under section 304 Part II of the Indian Penal Code. Likewise, she submitted that the evidence on records shows that there was no premeditation on the part of the appellants to commit the murder and the circumstance shows that the murder was committed on sudden provocation and so on the basis of the Apex Court's decision in the case of Dattau Shamrao Valake (referred above) it should be

held that this case falls under section 304 Part II of the Indian Penal Code and not under section 302 of the Indian Penal Code.

20. We are of the view that the argument advanced by the learned Amicus Curiae is not acceptable in view of the fact that the deceased was legally entitled to obstruct the appellants from taking away the paddy straw and it was the appellants, who were giving provocation to the deceased. There is absolutely no evidence on record that the deceased had given any provocation to the appellants which had caused annoyance to the appellants and due to that the appellants might have inflicted injuries. The circumstance shows that both the appellants intentionally inflicted several injuries by giving repeated blows on the person of the deceased, who was an old man aged about 58 years. The appellants knowing full well that the deceased was an old man gave such powerful blows which broke three ribs of the deceased which became the cause of his death. Under such circumstances, we are of the view that the assault done on the person of the deceased was done with intention to cause his murder. In such view of the matter, we are of the view that this case falls under section 302 of the Indian Penal Code and not under section 304 Part II of the Indian Penal Code. Hence, we reject the submission of the learned Amicus Curiae made to this effect.

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21. It has further been argued by the learned Amicus Curiae that at least appellant Ragho Jha deserves benefit of doubt as his conviction under section 302/34 of the Indian Penal Code is bad in law. She submitted that there is no evidence on record that there was

meeting of mind between the two appellants or there was any premeditation between the two for committing murder of deceased Gangadhar Pathak @ Kurkur Pathak and so, he has been wrongly convicted. Against this argument, learned state counsel submitted that although it is true that there is no premeditation between the two appellants but there is settled principle of law that common intention can develop at the spur of the moment and at the spot. Learned state counsel submits that the evidence on record shows that both the appellants had brutally assaulted the deceased even after he fallen down and, therefore, it can not be said that the appellant Ragho Jha had no intention to commit the murder of the deceased. We are of the view that the argument advanced by the learned state counsel is acceptable. In such view of the matter, we reject the argument of the learned Amicus Curiae that appellant Ragho Jha can not be convicted under section 302/34 of the Indian Penal Code.

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22. In the result, we do not find any merit in this appeal and, as such, the same is hereby dismissed. The conviction and sentence passed against the appellants under section 302/34 of the Indian Penal Code are upheld and confirmed. The appellants are on bail, as such, their bail bonds are hereby cancelled and they are directed to surrender before the court below to serve out the remaining part of the sentence.

23. High Court Legal Services Committee, Patna, shall pay a sum of Rs.2,500/- (two thousand five hundred) to the learned Amicus

Curiae towards her remuneration. The first and last page of the judgment be handed over to her.

(S. K.Katriar, J.)

(Syed Md. Mahfooz Alam,J.)

Patna High Court,
Patna
Dated the 22nd August, 2008
NAFR/ JA

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